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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 412

EDGAR RUNDLE,
Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edgar Rundle petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit decided in Case No. 19,797 on the 21st day of April, 1967.

OPINION BELOW

The opinion of the Court of Appeals has not been reported as of this time, but a copy of the opinion of the Court is attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21st 1967. Jurisdiction of this Court is founded under Title 28 USC 1254.

TREATIES AND STATUTES INVOLVED

Treaty between the San Carlos Apaches Indians of the San Carlos Reservation in Arizona, and the United States, as reported to Fifty-Fourth Congress Sess. 1, Ch. 298 – 1896.

AGREEMENT WITH THE INDIANS OF THE SAN CARLOS INDIAN RESERVATION IN ARIZONA

Article I

Land Ceded

That the said Indians do hereby cede, grant, and relinquish to the United States all right, title, and claim which they may have in and to all land embraces within the following described tract, now a part of the said San Carlos or White Mountain Indian Reservation, to wit:

All the land lying south of a line, commencing at a point on the present eastern boundary of the said reservation, one mile south of Goodwin Spring; thence in a general direction west to the highest point on Mount Turnbull; thence in a westerly direction to a point on a line between the agency building proper and Stanley, or the Saddle butte, seven miles from said building in a southerly direction; thence in a westerly direction at longest possible tangents to the mount of Hawk Canyon, not crossing said canyon; thence down the Gila River, following the south bank to a point

where said Gila River crosses the present western boundary of the reservation.

Article II

That in consideration of the lands ceded, relinquished, and conveyed, as aforesaid the United States stipulates and agrees to place in the Treasury of the United States to the credit and for the sole benefit of said Apache, Mohave, and Yuma Indians and to account therefore annually, to them through their agent, the net proceeds accuring from the disposal of such coal and mineral lands, lying within the ceded territory under the laws applicable thereto; and that said money shall be paid to them in cash from time to time as the same shall become available, pro rata, share and share alike, to each man, woman and child of the tribe now living upon and entitled to the privileges of the said reservation: Provided, that none of the money credited to said Indians under this agreement shall be subject to the payment of any claims, judgments or demands against said Indians for damages or depredations, claimed to have been committed prior to the signing of this agreement.

Article III

That for the purpose of segregating the ceded land and diminished reservation the new boundary line described in article one of the agreement shall be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, and that the cost of said survey shall be paid out of the proceeds of said ceded lands.

Article IV

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

Dated and signed at San Carlos Agency Arizona, on the 25th day of February 1896.

Province McCormick
U.S. Indian Inspector

The following articles of agreement have been fully explained to us in open council, we, the undersigned chiefs, headmen, and members of the several bands of Apache, Mohave and Yuma Indians attached to the receiving rations of the San Carlos Agency in the Territory of Arizona, do hereby consent and agree to all the stipulations therein contained.

Follows six hundred and three signatures of the adult male Indians of the San Carlos Reservation Wit: Albert L. Myer, Capt. Eleventh Inft. Acting Agt.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and is hereby accepted, ratified and confirmed.

The Secretary of the Interior shall cause the said boundary line (estimated length forty-five miles) as described, in article three of the agreement quoted and made a part of this Act, to be surveyed, marked and established, by permanent and durable monuments of stone, the same to be set at each mile and half-mile point and at the angles formed on said line, and set, marked and witnessed in conformity with instructions to be furnished by said Secretary of the Interior relating thereto; and compensation to be allowed for executing said survey not to exceed the sum of forty dollars per mile, including the monuments.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one thousand eight hundred dollars, or so much thereof as may be necessary, to carry into effect the provisions of the preceding section, said amount to be immediately available: Provided, however, That from the proceeds of the sale of lands ceded by said agreement there shall first be deducted an amount sufficient to reimburse the United States for the expenditure authorized by this section.

Lands open to mineral entry only.

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the aforegoing agreement are situated, of the approved plat or survey authorized by this section, the land so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the aforegoing agreement; Provided, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: Provided, however, That any person who in good faith prior to the passage of this Act had discovered and opened, or located, a mine of coal or other mineral, shall have a perfect right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

That the Secretary of the Interior is hereby directed to issue a patent in fee to Benjamin J. Clardy for the land heretofore allotted to him in the Territory of Oklahoma, as a citizen of Pottawatomie Indian, and all restrictions as to the sale, encumbrance of taxation of said land is hereby removed.

Approved June 10, 1896.

Title 43, Section 141 U.S.C.

WITHDRAWAL AND RESERVATION OF LAND FOR WATER SITES OR OTHER PURPOSES

The President, may at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States including Alaska, and reserve the same for water power sites, irrigations, classifications of lands, or other public purposes to be specified in the order of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Title 43, Section 142, U.S.C.

LANDS WITHDRAWN OPEN TO EXPLORATION UNDER MINING LAWS. RIGHTS OF OCCUPANTS OR CLAIMANTS TO OIL OR GAS BEARING LANDS NATIONAL FORESTS:

All lands withdrawn under the provision of this section and section 141 of this title shall at all times be open to exploration discovery, occupation, and purchase under the mining laws of the United States, so far as the same applies to metalliferous minerals.

Title 43, Section 315(f) U.S.C.

The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any land withdrawn or reserved by Executive Order of November 26, 1931 number 6910 and amendments thereto and Executive Order No. 6962 of February 5, 1935, or within a grazing district, which are more valuable or suitable for the production of agriculture crops, than for the production of native grasses and forages, plants, or more suitable for any other use than for the use provided under this chapter, or proper and acquisition in satisfaction of any outstanding lien, exchange, or script rights or land grant, and to open such lands to entry, selection, location for disposal in accordance with such classification under applicable public land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred twenty acres in all. Such lands shall not be subject to disposition settlement, occupation until after the same has been classified and open to entry Provided: that location and entries under the mining laws including sections 181-184, 184-188, 189-192, etc. of Title 30 may be made upon such withdrawn and reserved areas without regard to classification and without regard to restriction or limitation by any provision of this chapter.

Section 3 of the Indian Reorganization Act of June 18, 1934; 48 Stat. 984, 25 U.S.C. 463

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to, open, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States; Provided, however, That valid rights or claims of any person to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act.

QUESTIONS PRESENTED

1. Whether the decision of the Land Department and the Secretary of the Interior may in a proper case, be subject to review by the Court to the extent that where the Department has fallen in error and denies the parties the right to which they are entitled the Court may, in a proper case or proceeding interfere and refuse to give effect to the action of the Department Secretary of the Interior and to set aside or correct its decision.
2. Whether an action for a declaratory judgment, declaring the Petitioner's rights under an existing statute which was violated by the Secretary of the Interior, is an action against the Secretary of the Interior or an unconsented suit against the U.S. Government.
3. Whether a subsequent order of the Secretary of the Interior classifying certain lands here in question, as grazing land and incorporating said lands in a grazing district in 1936 nullified a prior order temporarily withdrawing this same land from all forms of entry.
4. Whether the Statute enacted by Congress and referred to as Title 43 Sections 141, 142 and 315 et seq. of the United States Code specifically exempted

location for mining purposes as an exception, and exemption to the withdrawal order of the President of the United States or the Secretary of the Interior.

5. Whether the language of the treaty of the San Carlos Apache Indians with the United States entered into in 1896 and ratified by Congress was an obligation on the part of our Governing authorities to see that said land shall remain open to mineral location, and for the use of the United States citizens, and the order of the Secretary of the Interior withdrawing the same from all forms of entry, was a violation on his part, and an ultra vires act.

6. Whether the statutory requirements of Title 43 Sections 14, 142, 315 et seq. of the U.S.C. to keep the lands of the public domain open to location under the mining laws is superior to the common law right of the Secretary of the Interior to withdraw this land from mineral entry.

7. Whether mineral entry and location is an exception to any withdrawal made under the authority of the Secretary of the Interior, and cannot be included therein.

STATEMENT OF THE CASE

Edgar Rundle, a United States citizen located and filed claims to 123 metalliferous mining claims on lands of the Public Domain in Graham County Arizona in that section of the County known as The Mineral Strip, which lies south of the San Carlos Indian Reservation, his claims were duly filed during the years of 1959, 1960 and 1961, in the Land Office of said county as will appear from the records (JA Nos. 14-15-16-17) Location work was completed on many of said claims, and subsequently thereto he was notified by the Bureau of Land Management in his local section that his claims were null and void, and to cease and desist in processing his claims and doing the allotment work on said claims,

an appeal was taken to Phoenix, Arizona, later in due course to Washington, and then to the Secretary of the Interior, (JA 18-19) all of which were denied to the Petitioner, and upholding the Bureau of Land Management in their contention that the Land in question was subject to a temporary withdrawal order, from all forms of entry by the Secretary of the Interior (JA 6-7-8) regardless of the fact that the Secretary had in 1936 incorporated this same land in question in Grazing District No. 4 of Arizona (JA 8) (JA 9-10-11) and Bureau of Land Management's maps (JA 12-13). Petitioner having exhausted all of his administrative procedural rights filed his action in the United States District Court for the District of Columbia (JA 2-3-4-5) a motion to dismiss was filed by the Secretary of Interior (JA 20) the Court granted the motion to dismiss, without having written an opinion or its reason for the same, the case was appealed to the United States Court of Appeals for the District of Columbia Circuit said Court also sustained the lower court's judgment on the motion to dismiss, Edgar Rundle, as Petitioner for certiorari, is now before this Honorable Court.

Accompanying these proceedings Petitioner has exhibited herewith his reply brief to the Secretary of the Interior's Answer in the United States Court of Appeals wherein the same land and same Apache Indians of Arizona filed their claim with the Indian Claims Commission during the year of 1963, and in said action the Government denied that said lands were Trust lands, but a part of the Public Domain, and that they had no right of action but only for an accounting for money due.

REASON FOR GRANTING THE WRIT

Petitioner says that the reason for allowance of this writ is, that the laws cited has but one interpretation, that the claims for Location under the mining laws has been complied with, that the withdrawal order of the land in question from all forms of entry, did not include mineral entry, for the statutes said so, and it is the purpose of the Statutes

cited to give Petitioner a right which the Secretary of the Interior has denied him.

That the decision of the lower court, cited in the case of *Hinton v. Udall*, in 364 Federal Reporter 2d series, has no bearing on this case, and is distinguished, because in said case there was no loss of occupancy, nor proven monetary loss, wherein this case, a loss has been sustained and a statutory right denied him. It is respectfully requested that certiorari be granted so that the judgment of the lower Courts may be reviewed and reversed.

Respectfully submitted,

MOSES DAVIS

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Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,797

EDGAR RUNDLE,
Appellant,

v.

STEWART L. UDALL,
Secretary of the Interior,
Appellee.

Appeal From the United States District Court for the District of Columbia

Decided April 21, 1967

Mr. Moses Davis for appellant.

Mr. Raymond N. Zagone, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.* and *Messrs. Roger P. Marquis* and *Walter H. Williams,* Attorneys, Department of Justice, were on the brief, for appellee. *Miss Elizabeth Dudley* and *Mr. S. Billingsley Hill,* Attorneys, Department of Justice, also entered appearances for appellee.

Before Bastian, *Senior Circuit Judge,* and Wright and Robinson, *Circuit Judges.*

Per Curiam: This is a companion case to *Hinton et al. v. Udall,* ___U.S.App.D.C.___, 364 F.2d 676 (1966), in which this court held that an attack on an order of the Secretary of the Interior restoring ownership of all mineral, oil and gas resources in certain so-called mineral strip lands in Arizona to the San Carlo Apache Tribe of Indians

was unripe for adjudication. The District Court in *Hinton*[1] had held that, assuming the justiciability of the issue presented, the Secretary had authority under Section 3[2] of the Indian Reorganization Act to withdraw from entry and to restore the subsurface rights in the mineral strip lands to tribal ownership. This appeal presents again the issue decided on the merits by the District Court in *Hinton.*[3]

The historical, statutory and administrative background of the issue here presented is thoroughly explored in the opinions of this court and the District Court in the *Hinton* case, so we do not repeat it here. Moreover, being in agreement with the excellent opinion written by Judge Tamm for the District Court holding that the Secretary was authorized to withdraw and restore the subsurface rights in the mineral strip lands to tribal ownership, we affirm this case for the reasons there stated. See 243 F. Supp. at 680-683.

Affirmed.

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[1] The District Court opinion is reported under the title of *Bowman et al. v. Udall,* D.D.C., 243 F.Supp. 672 (1965).

[2] 25 U.S.C. § 463 (1963).

[3] Unlike *Hinton,* no question of unripeness or standing is presented in this case. Appellant here had staked his mining claims on the land in suit and was beginning to work them when they were declared null and void by appellee.

S. Jack HINTON et al., Appellants,

v.

Stewart L. UDALL, Individually and as Secretary of the Interior, et al., Appellees.

No. 19671.

United States Court of Appeals District of Columbia Circuit.

Argued Feb. 17, 1966.

Decided June 27, 1966.

Petition for Rehearing Denied Aug. 15, 1966.

Certiorari Denied Oct. 10, 1966. See 87 S.Ct. 159.

Action by individuals and State of Arizona to enjoin Secretary of Interior from restoring any subsurface land in so-called [illegible] strip to Indian tribal ownership, United States District Court for [illegible]strict of Columbia, Edward A. Tamm, J., vacated a preliminary injunction granting plaintiff relief as to patented lands, 243 F.Supp. 672, and appeal was taken. The Court of Appeals, Leventhal, Circuit Judge, held that where order restoring subsurface lands to Indian tribal ownership was expressly made subject to any valid existing rights and specifically did not apply to any patented lands or any interest in any patented lands there existed no case or controversy between plaintiff landowners or lessees and the defendant and plaintiffs had no standing to maintain action to enjoin Secretary of the Interior from enforcing the restoring order.

Affirmed.

1. Courts ⇐281
Injunction ⇐114(2)

Where order restoring subsurface lands to Indian tribal ownership was expressly made subject to any valid existing rights and specifically did not apply to any patented lands or any interest in any patented lands there existed no case or controversy between plaintiff landowners or lessees and the defendant and plaintiffs had no standing to maintain action to enjoin Secretary of the Interior from enforcing the restoring order. Act June 10, 1896, 29 Stat. 321; Wheeler-Howard Act, §§ 1 et seq., 3, 25 U.S.C.A. §§ 461 et seq., 463; Taylor Grazing Act, § 1 et seq., 43 U.S.C.A. § 315 et seq.; Act June 20, 1910, §§ 24, 25, 36 Stat. 557.

2. Declaratory Judgment ⇐292

Fact that Indian Tribe initially sought restoration of surface as well as subsurface rights in certain lands and that Department of Interior took some steps in processing of that request, and that the request, later withdrawn, might be reactivated at some future time, did not mean that interests of plaintiff owners or lessees of land in surface rights to the land were affected so as to give them standing to have such possible future [illegible] declared invalid. Act June 10, [illegible] 29 Stat. 321; Wheeler-Howard Act, §§ 1 et seq., 3, 25 U.S.C.A. §§ 461 et seq., 463; Taylor Grazing Act, § 1 et seq., 43 U.S.C.A. § 315 et seq.; Act June 20, 1910, §§ 24, 25, 36 Stat. 557.

3. Action ⇐6

Doctrine whereby courts refrain from deciding legality of official actions that may never be taken in fact cannot be circumvented by showing that the overhanging possibility of such actions is depressing land values.

4. Injunction ⇐128

State which intervened in action seeking to enjoin Secretary of Interior from restoring any subsurface lands in so-called mineral strip to Indian tribal ownership failed to show that present and likely future actions of Secretary of Interior had cast a cloud on state's title to lands in the mineral strip where state was seeking to enjoin and declare illegal actions affecting whatever lands it did in fact own, but no showing was made that Secretary challenged state's title to any lands.

Mr. Rex E. Lee, Phoenix, Ariz., with whom Messrs. Ozell M. Trask, Phoenix, Ariz., and William E. Rollow, Washington, D. C., were on the brief, for appellants Hinton et al.

Mr. Dale R. Shumway, Phoenix, Ariz., of the bar of the Supreme Court of Arizona, pro hac vice, by special leave of court, with whom Mr. Darrell F. Smith, Mesa, Ariz., was on the brief, for appellant State of Arizona.

Mr. Raymond N. Zagone, Attorney, Department of Justice, with whom Messrs. Roger P. Marquis and Floyd L. France, Attorneys, Department of Justice, were on the brief, for appellees Udall et al.

Mr. Arthur Lazarus, Jr., Washington, D. C., for appellee, San Carlos Apache Tribe of Indians.

Before DANAHER, MCGOWAN and LEVENTHAL, Circuit Judges.

LEVENTHAL, Circuit Judge.

In this action, appellants sought to enjoin the Secretary of the Interior from restoring surface or subsurface rights in

certain lands in Arizona to the San Carlos Apache Tribe of Indians (hereafter "Indians" or "Tribe"), and further sought a declaratory judgment that the Secretary's restoration of subsurface rights to the Tribe, subject to existing rights, is illegal.

The lands involved were part of the San Carlos Reservation, which was created by executive order in 1872. By an 1896 agreement between the Indians of the reservation and the Government, the Indians ceded an area of approximately 232,000 acres, known as the "Mineral Strip," to the United States; in return the United States agreed to place in the Treasury, for the benefit of the Indians, "the net proceeds accruing from the disposal of such coal and mineral lands." In the statute approving the agreement, Congress expressly provided that "the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only." [1]

On March 30, 1931, the Department of the Interior, in response to the Tribe's desire that the lands be returned to it, and in view of the insignificant financial returns that had accrued to the Indians by virtue of the 1896 arrangement, withdrew the M..eral Strip lands from all forms of en.. .. On September 19, 1934, Secretary Ickes ..sued an order which listed the Mineral Strip lands as among those to be "temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights," [2] pending deci-

1. Act of June 10, 1896, ch. 398, 29 Stat. 321, 358.

2. Restoration of Lands Formerly Indian to Tribal Ownership; 54 I.D. 559, 563 (1934).

sion as to whether they would be restored to tribal ownership under the provisions of the Indian Reorganization Act Wheeler-Howard Act),[3] passed June 18, 1934. In 1934, as today, the Mineral Strip lands were occupied by non-Indian ranchers, such as the individual appellants in this case. On February 14, 1936, part of the Mineral Strip lands were incorporated within a grazing district established by the United States pursuant to the provisions of the Taylor Grazing Act, passed June 28, 1934.[4] Some of the appellants hold grazing permits on Mineral Strip lands within that district; others hold Taylor Act grazing leases on Mineral Strip lands outside the district; and still others claim title to Mineral Strip lands under patents from the United States. The State of Arizona, also an appellant, has claims to certain of the lands under various grants made to it by the United States.[5]

In 1958 the Tribal Council of the San Carlos Tribe adopted Resolution 58–7, requesting the Secretary to restore both surface and subsurface rights in Mineral Strip lands to the Tribe. On November 28, 1962, the Solicitor of the Interior Department held that undisposed Mineral Strip lands were "surplus lands" within the meaning of Section 3 of the Indian Reorganization Act of 1934, and that the Secretary therefore had authority to restore them to the Tribe.[6] On December

3. 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

4. 48 Stat. 1269, 43 U.S.C. § 315 *et seq.*

5. The State's claims are based on conveyances to it pursuant to Sections 24 and 25 of the Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557, 572 *et seq.*

6. Authority of the Secretary to Restore Lands, etc., 69 I.D. 195, 202 (1962).

10, 1962, Secretary Udall authorized Under Secretary Carr to determine whether such a restoration would be in the public interest. On January 10, 1963, appellants filed this action to enjoin and declare unlawful any such restoration.

On April 2, 1963, before any action had been decided upon by the Interior Department, the Tribal Council adopted Resolution 63–17, which requested return to the Tribe of sub-surface rights in the Mineral Strip. Resolution 58–7, with respect to surface rights, was withdrawn, to be "held in abeyance by the Secretary until reactivated by the San Carlos Council." On June 17, 1963, Under Secretary Carr issued Order No. 2874,[7] restoring to the San Carlos Tribe all "mineral, oil and gas resources" in the Mineral Strip lands, "subject to any valid existing rights" and excluding any patented lands. Appellants then amended their complaint to attack the validity of Order No. 2874, but still sought to enjoin restoration to the Tribe of surface as well as sub-surface rights in the Mineral Strip. The State of Arizona was permitted to intervene as a party plaintiff. The Tribe intervened as a party defendant.

After a trial, the District Court held, 243 F.Supp. 672 (1965), that neither the individual appellants nor the State of Arizona had standing to challenge the Secretary's actions, and that there was no case or controversy presented on which to base jurisdiction.[8] Assuming

7. 28 Fed.Reg. 4608 (1963).

8. In so holding, Judge Tamm disagreed with an earlier ruling by Judge Holtzoff, who, in granting appellants' motion for a preliminary injunction, as to patented lands, and denying appellees' motion for summary judgment, held that appellants did have standing to sue.

jurisdiction arguendo, the trial judge ruled the Secretary had authority under Section 3 of the Indian Reorganization Act to restore the Mineral Strip sub-surface rights to the Tribe. We affirm the judgment of the District Court on the ground that appellants do not present a controversy with the Secretary that is ripe for judicial intervention. We express no view as to the correctness of the District Judge's determination on the merits.

[1] Order No. 2874, restoring sub-surface rights to the Tribe, has not been shown to aggrieve appellants. The order by its terms is made "subject to any valid existing rights" in the Mineral Strip lands. Appellants make no showing that they have sub-surface rights which are impinged upon or affected by that order. The interests of those appellants who hold Taylor Act grazing permits or leases were expressly made subordinate to mineral interests by Section 6 of the Taylor Act, 43 U.S.C. § 315e. None of the other appellants has brought forth evidence that the Secretary intends to apply the order in such a way as to override the rights they claim. Although there is a vague premonition that restoration of sub-surface rights could affect appellants' surface use, their contention in this regard is shadowy; it lacks the kind of specific showing of conflict between these uses necessary to trigger judicial intervention.[9]

9. Appellants argue that an effect on surface rights is conceded in the order itself, which provides that any sub-surface uses in Mineral Strip lands within the Coronado National Forest are to be subject to supervision by the Secretary of Agriculture for the protection of surface resources. The Government says that this provision is intended merely as a

In essence, the claim of the individual appellants, engaged as they are in ranching, is based not on injury from Order No. 2874 as it stands, but from the possibility that the order may be amended or enlarged to restore surface rights.

[2] That the Tribe initially sought restoration of surface as well as subsurface rights in the lands, that the Department took some steps in the processing of that request, and that the request, now withdrawn, may be reactivated at some time in the future, does not mean that the interests of appellants in surface rights to the lands are affected so as to give them standing to have such possible future action declared invalid.

Appellants say it is "likely" that the Tribe's request for restoration of surface rights will soon be reactivated. That may be, but we have no way of predicting how the Secretary would act on such a request. True, the Solicitor of the Interior Department is of the opinion that the Secretary has the legal authority to restore the surface rights, and the appellants controvert that legal view. But a difference of opinion on legal issues is one for a moot court, and not our court, unless and until someone takes or threatens to take the action claimed to be illegal. There is no showing that restoration of surface rights will inexorably or even probably follow the action the Secretary has already taken. He may conclude that

confirmation of existing responsibility for management of the Forest. The record is silent as to the purpose of this proviso, and as to what kind of surface uses, or protection, was contemplated. This provision is not of itself sufficient to show any existing or imminent injury to appellant's surface uses from the restoration of sub-surface rights.

the public interest is served by stopping with restoration of sub-surface rights, and that the issue of surface rights presents different considerations. The Indian Reorganization Act does not require the Secretary to restore surface rights in the future simply because he has restored sub-surface rights. Section 3 of that Act authorizes restoration of surplus lands, but does not require it.

In our view this case calls for application of the doctrine rejecting as premature challenges to statutes and actions of officials or agencies by "litigants who have not been harmed or threatened with immediate harm" by such actions.[10] In applying this rule, as generally in applying the inter-related doctrines of ripeness and justiciability, we are called upon not for exercise in logic, or abstract application of all-embracing principles, but rather, in the words of Justice Frank-

10. Danville Tobacco Ass'n v. Freeman, 122 U.S.App.D.C. 135, 351 F.2d 832, 833 (1965). Other decisions of this court holding similar attacks on administrative action premature include Alaska Airlines, Inc. v. Pan American World Airways, Inc., 116 U.S.App.D.C. 128, 130, 321 F.2d 394, 396 (1963); Brandenfels v. Day, 114 U.S.App.D.C. 374, 377, 316 F.2d 375, 378, cert denied, 375 U.S. 824, 84 S.Ct. 66, 11 L.Ed.2d 57 (1963); Wolff v. Benson, 103 U.S.App.D.C. 334, 335, 258 F.2d 428, 429 (1958); United Air Lines v. CAB, 97 U.S.App.D.C. 42, 228 F.2d 13 (1955).

The Supreme Court cases using similar language cautioning against premature adjudication have usually involved challenges to constitutionality of statutes. See, *e. g.* Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961); ILWU v. Boyd, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954); Rescue Army v. Municipal Court, 331 U.S. 549, 568–575, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

furter, for concrete evaluation of "the resultant of many subtle pressures, including the appropriateness of the issues for decision * * *. and the actual hardship to the litigants of denying them the relief sought." Poe v. Ullman, 367 U.S. 497, 508-509, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961).[11]

The doctrine of ripeness often precludes immediate judicial consideration even in cases when judicial consideration seems well nigh inevitable; in such cases the doctrine operates to provide review later rather than earlier, and to assure review in a more concrete, focused context, on a more complete record.[12] Even

11. See generally JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch. 10 (1965); 3 DAVIS, ADMINISTRATIVE LAW § 21.10 (1958). In Judge Friendly's phrase, these issues are not to be solved "by applying some readily procurable litmus paper." Toilet Goods Ass'n, Inc. v. Gardner, 360 F.2d 677 (2d Cir. 1966).

12. This aspect of the ripeness doctrine is particularly stressed in cases which avoid constitutional decisions, even where jurisdiction concededly exists, "until the issues are presented with clarity, precision and certainty,"—"in clean-cut and concrete form." Rescue Army v. Municipal Court, 331 U.S. 549, 576, 584, 67 S.Ct. 1409, 1423 (1947).

In other instances the questions are of such breadth that they may as wisely be treated at the threshold. E. G., Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952). Compare Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). And where the governmental action challenged threatens rights protected by the First Amendment, courts may deem it particularly appropriate to intervene at an early stage. Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

more formidable are the barriers the court erects in situations like the case at bar where there is a reasonable possibility that the course of official action may be such, perhaps affected by negotiation with the suitors, that no submission to a court will be requisite.

When an agency has substantially crystallized its position, albeit in advance of the effective date of a sanction or order, the existence of a controversy ripe for judicial consideration may be sufficiently established by the present or imminent loss ascribable to the anticipated impact of the descending guillotine.[13] An interpretive or other regulation may have an immediate and practical impact as a messenger warning of consequences likely to follow, though not yet formally ordained.[14] But when the agency policy has not yet been given a form sufficiently precise to establish or forecast an interference with the rights of others, then the mere existence of financial harm, as in the case of impairment of credit, does not in and of itself suffice to establish a controversy ripe for judicial intervention.[15]

13. Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 417–421, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). See also Isbrandtsen Co. v. United States, 93 U.S.App.D.C. 293, 211 F.2d 51, cert. denied *sub nom.* Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990, 74 S.Ct. 852, 98 L.Ed. 1124 (1954).

14. Frozen Food Express v. United States, 351 U.S. 40, 43–44, 76 S.Ct. 569, 100 L.Ed. 910 (1956); FCC v. American Broadcasting Co., 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954); Toilet Goods Ass'n, Inc. v. Gardner, *supra* note 11.

15. United States v. Los Angeles & S.L. R.R., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651 (1927). Compare Allen v. Grand Central Aircraft Co., 347 U.S. 535, 539–540, 74 S.Ct. 745, 98 L.Ed. 933 (1954).

[3] These principles undermine the effort of the individual appellants to show that the case is ripe for judicial consideration on the ground that the order has decreased the value of their property interests. This depressing effect is ascribed to the "cloud" cast by the Secretary's present and possible future actions.[16] Assuming a decline in

16. The principal witness on this point was an appellant ranching some 20,000 acres. He said that in 1946 he paid almost $175,000 for a grazing lease of approximately 13,000 acres, a payment "for the other man's right to lease Taylor Grazing land." He testified that in his opinion the publicly announced position of the Secretary (presumably implied from the Solicitor's opinion), of the Department's right to restore the lands to the Indians, depreciated the value of the Taylor Grazing ranching privilege, and specifically reduced the fair market value of his ranch operation ($200,000, exclusive of cattle) by some 60%. On cross-examination he stated that the reduction resulted from the Tribe's request for restoration. For present purposes we take his testimony most favorable to appellants' case, as referring to the entire situation, including the Department's legal position, which he called a "cloud." He also testified that the cloud deterred investment in fences, tanks and trails, etc., necessary to conduct an efficient ranching operation.

It is unnecessary to consider the District Court's position that the testimony of impairment of value was insufficient because unsupported by testimony of specific reductions in prices of offers, broker listings, etc. In our view the lack of ripeness was basic and would not have been cured by the addition of such factual evidence underlining decline in market values of ranches based on grazing permits. Even assuming a serious and definite current decline in market value, it results not from any decision made by the Secretary as to the action he intends to take, but from the fear that he will reach an unfavorable decision.

value as claimed, it is ascribable primarily if not solely to apprehensions concerning the possible restoration of surface rights to the Indians. The doctrine whereby courts refrain from deciding the legality of official actions that may never be taken in fact cannot be circumvented by showing that the overhanging possibility of such actions is depressing land values. Land value quotations may be affected by many possibilities far too speculative, contingent and unformed to permit determination of judicial validity. Land values, like securities values, are sensitive to mere expressions of interest in buying and selling, or even to the mere existence of an interest sufficient to warrant analysis by sellers and buyers as to the possibility of zoning changes, corporate expansions, new Government programs, and the like. Where fears or hopes are based on underlying contingencies that have not developed in reasonably firm and concrete form, the resulting effects on market value are insufficient to warrant judicial determination of the legality of the unformed possibility.

There may be cases where impairment of market values ensuing as a result of official action establishes, or helps to establish, standing and ripeness. Thus in Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the general validity of a zoning ordinance was considered at the behest of a property owner who alleged impairment of market values resulting from the existence of the ordinance "being enforced in accordance with its terms," 272 U.S. at 384, 47 S.Ct. at 117. That principle is not properly extended to the case at bar, where the

restriction of land use results not from the present terms of the regulation, but from a fear that the present terms may be modified.

[4] Even more tenuous than the position of the individual appellants is that of the State of Arizona, which argues that the present and likely future actions of the Secretary have cast a cloud on the State's title to lands in the Mineral Strip. A cloud on that title there may be, but not as a result of the Secretary's order assailed in this action. The State was seeking to enjoin and declare illegal action affecting whatever lands it does in fact own. It did not show that the Secretary challenges Arizona's title to any lands. It appears that the underlying legal questions troubling Arizona neither arise from the Secretary's order nor would be resolved by a judicial ruling as to the validity of that order.[17]

Appellants may pursue remedies with Congress to set at rest even niggling doubts. But whereas a legislature may act to prevent a controversy from arising, a court may act only when a case or controversy has arisen and is ripe for decision. We hold that the appellants in this case have not shown injury from any action taken or threatened by the appellees that warrants judicial consideration of the dispute concerning the Secretary's legal authority.

Affirmed.

17. The problem of the nature and security of the State's title to Mineral Strip lands conveyed to it has existed since the passage of the Enabling Act, *supra* note 5. The problem is one of interpreting the cession to Arizona in the light of the Act of 1896, *supra* note 1, which provided that lands ceded by the Indians should be disposed of "under the provisions of the mineral-land laws only." In 1941 the

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 412

EDGAR RUNDLE, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ of certiorari should be denied because it was not timely filed.

The judgment of the court of appeals was entered on April 21, 1967 (Pet. 1–2), and the ninety-day period for filing a petition expired on July 20, 1967. No extension of time for petitioning was sought or obtained. The petition was filed on July 24, 1967, 94 days after the entry of judgment. It was therefore untimely, and the Court has no jurisdiction to entertain it. 28 U.S.C. 2101(c); Rule 22(3) of the Rules of this Court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

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PETITIONER'S REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION AND PETITIONER'S MOTION FOR AN ORDER DIRECTING THE PETITIONS FILED NUNC PRO TUNC, AS OF JULY 20, 1967

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The Petitioner for Certiorari, Edgar Rundle, and Moses Davis, as his attorney of record, prays that an order of this Honorable Court directing his petition for certiorari be filed as of July 20, 1967, and say:

That the certified copies of the records of the United States Court of Appeals for the District of Columbia Circuit had been filed in the office of the Clerk of this Court several days prior to the expiration date, being July 20, 1967, and

that the docketing fee was deposited with the Clerk of this Court.

That the required number of printed petitions were printed by Thiel Press of Washington, and on the 20th day of July, 1967 this attorney for Petitioner appeared in Washington about 1 o'clock in the afternoon on said date to secure the printed petitions and perfect service, issue his certificate, and filed the same with the Clerk of the Court; however, unexpectedly, while in the office of Thiel Press, this attorney suddenly became ill, and a rash appeared on his face and hands, and he felt as if he had a burning sensation all over, that he considered it necessary for his safety to return to Baltimore and see his physician, that for several days prior thereto he had been taking a sulphur drug prescribed by his physician to remedy a sinus infection, and that he was not previously warned to avoid being in the sun, and his illness was caused by this trip and the midday sun, and that on said day it was too late to appear before any Justice of this Court to request an extension of time, and he was advised by his physician to stay at home until the condition improved.

That July 24th was the first day that he would again return to perform his duties.

Granting Petitioner's motion for a nunc pro tunc order extending said time four days (two of which were a weekend) would not prejudicially delay the disposition of this cause, it has not been set for argument, nor would it impede the argument calendar.

Jurisdiction is founded on the General Powers of this Court to see that justice shall prevail, and that no prejudice could result therefrom.

Respectfully submitted,

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